(2)

No. 06-983

FILED
FEB 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROBERT J. DEBRY AND ASSOCIATES, P.C.

Petitioner,

vs.

QWEST DEX, INC., and DEX MEDIA WEST, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HOLME ROBERTS & OWEN LLP
BOBBEE J. MUSGRAVE
(*Counsel of Record*)
PAUL J. LOPACH
1700 Lincoln Street, Suite 4100
Denver, CO 80203
Telephone: (303) 861-7000 Fax: (303) 866-0200

Counsel for Respondents

BEST AVAILABLE COPY

CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Sup. Ct. R. 29.6, Respondent Dex Media West, LLC purchased the assets of Qwest Dex, Inc. relevant to this case and acquired its liabilities in a transaction that closed in September 2003. Dex Media West, LLC is wholly-owned by Dex Media West, Inc., which is in turn wholly-owned by Dex Media, Inc. R.H. Donnelly Corp. purchased all outstanding stock and assumed all liabilities of Dex Media, Inc. effective January 31, 2006.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. The Supreme Court Should Deny DeBry's Petition Because It Raises No Issues Warranting This Court's Review	4
A. The Petition presents no Circuit split, conflict with Supreme Court precedent, or other cognizable grounds for certiorari	4
B. The record of this case makes it ill-suited for this Court's review	8
C. The Tenth Circuit's unanimous decision is unpublished and the Utah Supreme Court's decision is beyond review	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888 (1988) 11

County of Westchester v. Commissioner of Transp., 9 F.3d 242 (2d Cir. 1993) 5, 6, 7

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 6, 11

Gryger v. Burke, 334 U.S. 728 (1948) 11

Martin v. Walton, 368 U.S. 25 (1961) 11

Mullaney v. Wilbur, 421 U.S. 684 (1975) 9, 10, 11, 12

Railroad Comm'rs v. Pullman Co., 312 U.S. 496 (1941) 10

Reinkmeyer v. Safeco Ins. Co., 166 F.3d 982 (9th Cir. 1999) 10

Robert J. DeBry & Assoc. v. Qwest Dex, Inc., 144 P.3d 1079 (Utah 2006) 10

Tarr v. Manchester Ins. Co., 544 F.2d 14 (1st Cir. 1976) 10

STATUTES AND RULES

U.S. Sup. Ct. Rule 10 ..... 4, 5

Utah Code Ann. § 13-11a-3 ..... 7, 8, 9

Utah R. App. Pro. 41 ..... 10, 11

STATEMENT OF THE CASE

Petitioner Robert J. DeBry and Associates ("Plaintiff" or "DeBry") is a personal injury law firm doing business throughout the State of Utah. Defendants and Appellees, Qwest Dex, Inc. and Dex Media West LLC (collectively referred to as "Dex"), print telephone directories throughout the State of Utah.

DeBry sued Dex under the Utah Truth in Advertising Act ("UTIAA") over Dex's sale and publishing of advertisements featuring Market Expansion Line ("MEL") phone numbers[1] but no address. DeBry alleged that such ads lead consumers to believe that the advertiser is a "local" business when in fact it may be located in a neighboring community, and that consumers are misled because the ad features a phone number with a "local" prefix. The lack of an address allegedly hinders the consumer's ability to discern the advertiser's whereabouts. DeBry claims that such advertisements, when used by its competitors, lead prospective clients to retain other personal injury law firms, thereby causing it damages in the form of lost revenue.

DeBry commenced its action in the State Second District Court of Weber County, Utah. Dex removed the case to the United States District Court for the District of Utah pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Following removal, Dex moved to dismiss DeBry's claims under Fed. R. Civ. P. 12(b)(6). The District Court of Utah granted the motion, holding that DeBry failed to state a

[1] MEL phone numbers feature call-forwarding functionality. That is, when a party calls a MEL number the call is automatically routed to another local or long distance number.

claim under any of the three provisions of the UTIAA pled in the Amended Complaint. The court also dismissed DeBry's claim for tortious interference with prospective economic relations. (App. D-11)

DeBry then appealed the dismissal of its UTIAA claim to the United States Court of Appeals for the Tenth Circuit. Following submission of the parties' appellate briefs, the Tenth Circuit panel determined *sua sponte* that the appeal presented a novel question of Utah State law and therefore certified the following question to the Utah Supreme Court pursuant to 10th Cir. R. 27.1 and Utah R. App. P. 41:

> Whether Defendants violated Utah Code Ann. § 13-11a-3(1)(b), (d), or (t) when they published in their 2003-2004 Ogden-area telephone directory a table of numerical prefixes associated with a "local calling area" and advertisements by third parties that include a market expansion line telephone number without any physical business address; and if so, whether Defendants are exempt from liability under Utah Code Ann. § 13-11a-5(1).

(App. A-1, 2)

The Utah Supreme Court answered the first part of the certified question in the negative, concluding that Dex had not violated any of the paragraphs of Utah Code Ann. § 13-11a-3(1) at issue and therefore declined to address the second part of the certified question relating to Utah Code Ann. § 13-11a-5(1) as unnecessary. (App. B-9, 10)

DeBry then filed a Petition for Rehearing with the Utah Supreme Court, arguing that it had ignored certain facts in the Tenth Circuit panel's certification order. The

Utah Supreme Court denied DeBry's petition without comment. (App. E-1)

Upon return to the Tenth Circuit, the panel adopted the Utah Supreme Court's ruling and affirmed the dismissal of DeBry's UTIAA claim. (App. C-1, 2) DeBry then filed a Petition for Rehearing with the Tenth Circuit panel, which was also denied without comment. (App. F-1) DeBry's Petition for Writ of Certiorari to this Court followed.

SUMMARY OF THE ARGUMENT

DeBry's Petition does not present issues which warrant this Court's review. There is no split between Federal Circuits or State supreme courts at issue here, nor did the decision of the Tenth Circuit deviate from this Court's jurisprudence. At each stage of the case, each court to hear DeBry's arguments has ruled against it, including two unanimous decisions by both a panel of the United States Tenth Circuit Court of Appeals and the Utah Supreme Court. Finally, the Utah Supreme Court's ruling on a question of state law is, on the facts here, beyond this Court's power to review. Even if this Court were to grant the requested relief, the Federal courts would still be bound by the State court's interpretation of its own State laws and procedures and therefore would be compelled to reach the identical result on remand. DeBry's Petition should accordingly be denied.

ARGUMENT

I. The Supreme Court Should Deny DeBry's Petition Because It Raises No Issues Warranting This Court's Review.

A. The Petition presents no Circuit split, conflict with Supreme Court precedent, or other cognizable grounds for certiorari.

Rule 10 of this Court recites that certiorari will be granted only for "compelling reasons" and sets forth the most likely grounds for review:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S. Sup. Ct. R. 10. Patently, neither Rule 10(b) nor (c) are implicated in DeBry's Petition – the Tenth Circuit panel and Utah Supreme Court made no decisions regarding

federal questions, not even implicitly. With regard to the grounds of Rule 10(a), there is no allegation in the Petition of conflicting rulings either between Federal Circuits or between the Circuits and State supreme courts. The sole possible basis for certiorari that can be discerned from the Petition is that DeBry is implicitly arguing that the Tenth Circuit panel, by accepting the Utah Supreme Court's answer to the certified question containing a recitation of facts which did not perfectly track the language of the certification order, has somehow "departed from the accepted and usual course of judicial proceedings," as proscribed by Rule 10(a). Yet, even assuming the Utah Supreme Court's recitation of the facts deviated in some manner from the facts given in the certified question, that would not merit a grant of certiorari given past case law on the subject.

Despite DeBry's assertion that there are "[p]robably . . . *many many* other cases" involving State supreme courts "sidestepping" certified questions, Petition, p. 14 (emphasis in original), Dex has only been able to locate one case in which such an allegation was seriously made, and the guidance of the Circuit Court there is fully applicable here. In *County of Westchester v. Commissioner of Transportation*, 9 F.3d 242 (2d Cir. 1993), the Second Circuit certified a question to the Connecticut Supreme Court asking whether it was possible to obtain an avigation easement by prescription. The Connecticut Supreme Court refused to answer the question, explaining that while prescriptive easements were possible under Connecticut law, the easement had to be obtained through adverse conduct. Since the conduct described in the certified question could not be considered adverse, the court concluded that no such easement could have been

created. *Id.* at 246. After the case returned to the Second Circuit, the plaintiff asked the court to reject the Connecticut Supreme Court's ruling, because the Connecticut Supreme Court did not answer the certified question and improperly based its decision on independent findings of fact. The Second Circuit rejected that argument stating:

> The County argues that the Court did not respond to the questions certified and that the Court improperly based its decision on independent findings of fact. Putting to one side the question whether we could reject the Connecticut Court's response – the County cites no case where that has occurred – we see no persuasive reason why we should do so. It is true that the Court did not answer precisely the first question we certified, *i.e.*, the general question of whether an avigation easement can be acquired by prescription under Connecticut law. Nonetheless, the Court did answer a material subset of that question, *i.e.*, whether an avigation easement can be acquired under Connecticut law in these circumstances. We believe that the Connecticut Supreme Court's decision is dispositive, both as responsive to our certification and also, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), as a controlling statement of state law regarding a common law claim.
>
> The County asserts that "the Connecticut Supreme Court has disregarded the mandate of this Court, and usurped the jurisdiction of this Court by presuming to decide an ultimate question of fact which is the sole prerogative of this Court." We think the County mischaracterizes the Connecticut Supreme Court's opinion. To the contrary, the Court applied Connecticut's adverse use requirement to the record supplied by the

> district court and determined that the County could not, as a matter of Connecticut law, have acquired a prescriptive avigation easement.

County of Westchester, 9 F.3d at 246-47. Accordingly, the Second Circuit accepted the Connecticut Supreme Court's ruling on the certified question.

This guidance is clear, uncontradicted by any other authority, and is fully applicable to the instant case as can be seen from the face of DeBry's Petition for Certiorari.[2] In its Petition to this Court, DeBry recites a number of alleged differences between the facts recited in the Tenth Circuit panel's certification order and the Utah Supreme Court's decision. *See* Petition, pp. 11-14. However, even if those differences are viewed as something more than a minor variation in wording, they are still a "material subset" of the certified question, as was the situation in *County of Westchester*, 9 F.3d at 246-47. For example, UTIAA does not set any minimum number on how many consumers must be deceived before an action will lie, nor does the statute use the words "trick" or "mislead." *See* Utah Code Ann. §§ 13-11a-3(1)(b), (d) & (t) (App. B-5) Thus, whether the Utah Supreme Court accepted DeBry's figure that "67% of Dex consumers are tricked or misled" or, as the Utah Court recited in its decision, "some" consumers are subject to "confusion or misunderstanding," (App. B-9), is irrelevant to the certified question – the recitation of facts in the Utah Court's decision were a material subset of the facts as certified.

---

[2] Although the Tenth Circuit panel did not specifically cite the *County of Westchester* decision in its denial of DeBry's Petition for Rehearing, Dex discussed the case at length in its Response to the Petition for Rehearing.

In short, the Tenth Circuit panel directed the Utah Supreme Court to answer whether Dex *violated* UTIAA. (App. A-1, 2) The Utah Court answered that question in the negative and the Tenth Circuit was fully satisfied with that response. In the absence of any contrary authority from another Circuit or this Court, and given the well-reasoned on-point authority already issued by the Second Circuit in *County of Westchester*, there is no reason for review.

B. The record of this case makes it ill-suited for this Court's review.

Not only has DeBry failed to raise any issue meriting this Court's review but, given the record of this case, even if this Court was to ultimately rule in DeBry's favor the final result on remand would be the same. DeBry is implicitly asking this Court to order the Tenth Circuit panel to set aside the Utah Supreme Court's answer to the certified question and instead make a *de novo* interpretation of Utah Code Ann. § 13-11a-3 and other sections of UTIAA as necessary. However, as the record in this case shows, DeBry already argued for its preferred interpretation of UTIAA to the Tenth Circuit panel in its original appellate brief. The panel concluded it required guidance on the statutes at issue, certified the interpretation question to the Utah Supreme Court, and then adopted the resulting opinion of that court in its entirety without either a concurrence or dissent that might suggest any doubt on the panel's part as to the correctness of the Utah Supreme Court's determination. (App. C-1, 2) On DeBry's petition for rehearing (which made substantively identical arguments to those it makes here), the Tenth Circuit panel again unanimously rejected its arguments. In short, there

is nothing in the record to suggest that a different outcome would result on remand, even if the Tenth Circuit was to undertake a *de novo* review of the statutes at issue. Indeed, as discussed *infra*, even if this Court were to give DeBry its requested relief, the Utah Supreme Court's opinion would remain binding precedent on the interpretation of Utah Code Ann. § 13-11a-3. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here.") (citations omitted). Thus, on remand the Tenth Circuit would be bound to reach the same result again. This Court and the Tenth Circuit both have better uses for their time than replaying a case to reach the same outcome.

C. The Tenth Circuit's unanimous decision is unpublished and the Utah Supreme Court's decision is beyond review.

The Tenth Circuit did not select its Order and Judgment in this case for publication. As the footnote on the first page of the Tenth Circuit's Order and Judgment states: "This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel." (App. C-1) Consequently, the Tenth Circuit's decision in this action has not established precedent within the Circuit and, therefore, has no broad impact. This fact weighs against granting DeBry's Petition. Furthermore, the Order and Judgment of the Tenth Circuit in this case was unanimous. There is no indication that the actions of the Utah Supreme Court presented issues that any member of the Tenth Circuit panel found

troubling, despite DeBry's strained efforts to raise their interest via its Petition for Rehearing.

The Utah Supreme Court's opinion on the certified question *was* published in the Pacific Reporter at 144 P.3d 1079, pursuant to Utah R. App. Pro. 41(h) which directs that opinions on certified questions are to be published and reported. However, that is irrelevant to the matter of whether this Court should grant DeBry's Petition. Indeed, even if this Court were to ultimately grant DeBry its requested relief, that would not overrule, vacate, or otherwise impact the vitality of the Utah Supreme Court's opinion interpreting UTIAA.

As this Court has stated, "The last word on the meaning of [a state statute] belongs neither to us nor to the district court but to the Supreme Court of [the state]." *Railroad Comm'rs v. Pullman Co.*, 312 U.S. 496, 499-500 (1941); *see also Mullaney*, 421 U.S. at 691; *Reinkmeyer v. Safeco Ins. Co.*, 166 F.3d 982, 984 (9th Cir. 1999) ("We are bound by the answers of state supreme courts to certified questions just as we are bound by state supreme court interpretations of state law in other contexts.") (collecting cases); *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 14 (1st Cir. 1976) ("No matter what the result, we cannot 'correct' a state court's interpretation of its own law."). The Utah Supreme Court's interpretation of UTIAA in this case will remain binding precedent on the subject until either the Utah State Legislature amends the statute or the Utah Supreme Court overrules itself in some hypothetical future case.

Furthermore, the entire basis for DeBry's assertion that the Utah Supreme Court "had no power to decide fact issues" (which it did not do) is based on the language of

Rule 41(c)(2) of the ***Utah*** Rules of Appellate Procedure. Just as this Court is ordinarily without power to review a State court's interpretation of State statutes or application of State common law, so too is it equally without power to review a State court's application of its own procedural rules unless it rises to the level of a violation of the U.S. Constitution. *Martin v. Walton*, 368 U.S. 25, 25-26 (1961) (application of state supreme court procedural rules presented no question for review so long as they did not violate the Fourteenth Amendment to the U.S. Constitution); *see also Gryger v. Burke*, 334 U.S. 728, 731 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."). DeBry has made *no* allegations that its Fourteenth Amendment rights were violated by either the Tenth Circuit or Utah Supreme Court and any such argument coming in reply for the first time should plainly be rejected as untimely raised. *See Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 895 (1988).

The only way on these facts that this Court could direct a Federal appellate court to ignore a State supreme court's interpretation of State law or override a State supreme court's application of its own procedural rules, as DeBry requests, would be by overruling *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) – the absolute bedrock of modern diversity jurisprudence.[3] This is not the case to

[3] Dex acknowledges this Court identified a very narrow exception to the *Erie* doctrine in *Mullaney*, where it noted that Federal courts could revisit a state court's interpretation of state law if the state court was engaged in "obvious subterfuge to evade consideration of a federal

(Continued on following page)

revolutionize the operation of a substantial part of the American legal system.

CONCLUSION

For all the foregoing reasons, Dex opposes DeBry's Petition and respectfully requests that the Court deny it.

Respectfully submitted,

BOBBEE J. MUSGRAVE, ESQUIRE
(Counsel of Record)
PAUL J. LOPACH, ESQUIRE

Attorneys for Respondents

February 16, 2007

issue." 421 U.S. at 691 n.11. However, DeBry has not alleged any such subterfuge in this case.